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IN THE

Supreme Court of the United States

October Term, 1959

No. ~~990~~ 121

MAX REISSNER,

Petitioner,

against

WILLIAM P. ROGERS, as Attorney General of the United States and Successor to the Alien Property Custodian, and IVY BAKER PRIEST, Treasurer of the United States,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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MAX REISSNER,

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Max Reissner, the Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, filed in the above entitled case on March 10, 1960.

Opinions Below

The Memorandum Opinion of the District Court is printed at page 12 of the Joint Appendix and is unreported. The opinion of the Court of Appeals, printed in Appendix B hereto, *infra*, pages 17 to 29, is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was dated and entered on March 10, 1960.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1284(1).

Questions Presented

1. Did the Court below in Point III of its opinion (App. B, pp. 26-29) misapprehend or grossly apply the standard of review when it held

A. That the District Court could not overturn the Attorney General's finding that under the German Conversion Law Reissner's claim was subject to conversion at the 10 to 1 rate, unless the finding was clearly erroneous? and

B. That the District Court committed reversible error in determining that Reissner's claim was not subject to conversion at the 10 to 1 rate under the German Conversion Law, because a claim for unliquidated damages necessarily could not qualify as a debt within the meaning of Section 34 of the Trading with the Enemy Act?

2. Did the Court below in Point II of its opinion (App. B, pp. 24-26) err in reversing the District Court which, in converting Reissner's German currency claim into dollars, had applied the "date of filing suit rule" rather than the "judgment date rule"?

Statutes Involved

The statutory provisions involved are:

1. Trading with the Enemy Act as amended, Section 34, 60 Stat. 925, 50 U. S. C. App. 34(a). The said Statute is printed in Appendix A, *infra*, pages 15 to 16.

2. Federal Rules of Civil Procedure, 28 U. S. C. 52(a). The said Rule is printed in Appendix A, *infra*, at page 16.

Statement of Case and Disposition Below

Max Reissner, a United States citizen, filed a claim with the Office of Alien Property on February 24, 1948 against the solvent account of Schering-Kahlbaum A. G., hereinafter referred to as Schering. Reissner had founded and developed a very successful pharmaceutical business in Germany which was known as "Anticoman GmbH", hereinafter referred to as Anticoman. He was the sole owner of this business and a product called anticoman, a remedy against diabetes, which was manufactured, sold and distributed throughout the world.

In 1937, Reissner, a man of the Jewish faith, was forced to sell Anticoman to Schering because of Nazi persecution of his co-religionists and himself. This was a matter of public knowledge, and the Chief Hearing Examiner, Harry LeRoy Jones, found "Schering knew that Reissner was a Jew and was under Nazi pressure to abandon Anticoman and to leave Germany." "While the Nazis shook the tree, Schering held the basket and caught the fruit" (40).* On February 24, 1948, he filed a claim in the Office of Alien Property and contended that the 1937 sale to Schering was void under Section 138 of the German Civil Code because it was *contra bonos mores* and because of the inadequate purchase price resulting from Schering's exploitation of Reissner's religious disability; that these acts gave rise to claims in quasi-contract for unjust enrichment under Sections 812, 817, 818 and 819 of the German Civil Code (28-29), entitling him to the return of the business and on failure of return, to damages from Schering; and that this is a valid debt claim under Section 34 of the Trading with the Enemy Act. 60 Stat. 925, 50 U. S. C. App. 34.

Harry LeRoy Jones recommended that Reissner's claim be allowed in the amount of RM 273,507 as damages, to-

* All page references hereafter are to the Joint Appendix.

gether with interest at 4% from March 1, 1937, the date of transfer. The Chief Hearing Examiner also recommended that this currency obligation be converted into dollars at the rate of RM 3.33 to $1.00, the exchange rate prevailing in 1948 when the claim was filed. On review, the Deputy Director of the Office of Alien Property agreed with the Hearing Examiner that a debt claim had been stated, and that the outstanding debt was RM 273,507. He ruled, however, that he would not adopt that part of the Recommended Decision (50-53), which found that under German law the claim was one for damages and not a Reichsmark debt and therefore not subject to devaluation under the German Currency Conversion Law of 1948. He further ruled not accept the Recommended Decision to the extent that it (54-70) suggested the date for the conversion from German to American currency as the date when the claim was filed with the Office of Alien Property (1948) rather than at the rate of exchange prevailing on the date of judgment. On December 23, 1957, the Attorney General, successor to the Alien Property Custodian, approved the Deputy Director's Decision. Reissner filed a complaint for review of this decision in the District Court, asserting that the Attorney General's decision was incorrect insofar as it failed to fix the amount of the indebtedness at RM 651,331, and that the Attorney General was in error when he held that the debt was subject to 90% devaluation by reason of the German Currency Conversion Law. Reissner further asked that he was entitled to the most favorable date for the conversion of German currency to American dollars, that of RM 2.50 for $1.00.

The basis for the jurisdiction of the United States District Court for the District of Columbia was the provisions contained in Section 34(e) of the Trading with the Enemy Act, 50 U. S. C. at 34(e).

The District Court sustained the finding of the Deputy Director as to the amount of the indebtedness but impliedly

agreed with the Chief Hearing Examiner that the German Currency Conversion Law was inapplicable and that the date for the conversion of German currency into American dollars was the date when Reissner filed his claim with the Office of Alien Property and it entered judgment for $82,134.20 plus interest at 4% from March 2, 1937. Both Reissner and the Attorney General appealed from various parts of the District Court's judgment, Reissner contending that the amount of the debt claim was calculated at too low a figure and that the date of conversion from German currency to American dollars should be the date most favorable to him. The Attorney General appealed from so much of the judgment which held that Reissner's claim was not subject to devaluation under the German Currency Conversion Law, and that the "judgment day rule" rather than the "suit day rule" was the proper rule to be applied for the conversion of German currency into American dollars. Both the Attorney General and the District Court were in agreement that Reissner's claim against Schering was eligible as a "debt claim" within the meaning of Section 34 of the Trading with the Enemy Act as amended, 50 U. S. C. App. Section 34; and the Court of Appeals accepted the Government's contention to this effect (App. B, p. 20).

The Court of Appeals in an Opinion dated March 10, 1960 found that the amount of the indebtedness was properly determined by the District Court, but reversed the District Court to the extent that it had held that the proper date for the conversion of German currency to American dollars was the date when Reissner filed his claim with the Office of Alien Property rather than the judgment day, and further, that Reissner's claim was a Reichsmark debt under German law, and therefore subject to the 90% devaluation provisions of the German Currency Conversion Law.

Reasons for Granting the Writ

1. The Court below has decided an important question of federal law when it held that the District Court on review could not overturn a finding of the Attorney General as to foreign law, in a proceeding under the Trading with the Enemy Act, unless such finding was clearly erroneous. The Court below misapprehended and grossly applied the standard of review, and this Court has intervened in those instances where the standard appears to be misapprehended or grossly applied. *NLRB* v. *American National Insurance Co.*, 343 U. S. 395; *FTC* v. *Standard Oil Co.*, 355 U. S. 396.

Furthermore, the Court below erred in interpreting Section 34 of the Trading with the Enemy Act, as not being applicable to claims for damages. It held that the German Conversion Law necessarily was applicable to Reissner's claim, because any other interpretation would run counter to the "underlying policy" of Section 34, which allegedly does not contemplate that a debt claim could encompass claims for unliquidated damages. This again involves an important interpretation of federal law which should be settled by this Court.

Finally, the standard of review was grossly misapplied by the Court of Appeals when it only examined the standard to be applied by the District Court as to the Attorney General's findings, rather than the standard to be applied by it to the District Court's decision.

The District Court's decision was not clearly erroneous when it held Reissner's claim was not subject to a 90% devaluation under the German Currency Conversion Law since it was a claim for damages and not a Reichsmark debt.

Reissner's claim is one arising out of German law and ultimately had to be expressed in German currency. The

German unit of currency prior to June 20, 1948, was the Reichsmark.

At that time, the German Currency Conversion law created a new unit of currency, namely, the Deutsche Mark (App. B, p. 27), and certain categories of debts were to be converted in Deutsche Marks at the rate of one Deutsche Mark to 10 Reichsmarks. However, under German law, a claim for unjust enrichment arising from the taking of property in bad faith was one for damages and not subject to devaluation.

Article 13 of the German Conversion Law (Appendix B, footnote, p. 27) defined *Reichsmark* debts and claims "as debts and claims arising out of debts incurred before June 21, 1948, which are expressed in Reichsmarks * * *." Since Schering concededly acted in bad faith, that is, it knew that Reissner was Jewish and compelled to sell,* Reissner then became entitled to damages and no debt expressed in *Reichsmarks* was created at that time.

The Federal Supreme Court of Germany held in 1953:

> "Claims for damages for the loss of a thing are not claims for a sum of money, as is required in Section 13 of the Currency Law. The courts have consistently refused the application of the Currency Reform Law to claims for damages, unless prior to the currency reform date a so-called fixation to a claim for a sum of money had taken place." Federal Supreme Court, Grand Civil Senate, November 16, 1953, J. Z. 1954, p. 318.

By fixation the Court meant the reduction of a claim to a sum certain by judgment or agreement between the parties. This, of course, was not the case as to Reissner's claim.

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* The German cases cited by the Court below in its Opinion (App. B, p. 28) are cases of unjust enrichment where the debtor did not know that it had obtained the object without legal ground. (Bad faith) Section 819 of the German Civil Code. Thus, they must be distinguished from those cases where the element of bad faith is present. The German cases clearly make this distinction.

See also, decisions of the Supreme Court for the British Zone, February 15, 1950, N. J. W. 1950, p. 464; Court of Appeals of Munich, March 23, 1953, N. J. W., R. Z. W. 1953, p. 232, No. 16.

The Court below relied on the Government's witness, Dr. Schoch, as to her interpretation of German Law, but a full examination of her opinion (123-131) indicates that she herself agrees with the Petitioner's interpretation of German law, when she stated (43):

> "If we assume as a fact claimant's allegation that Schering knowingly took advantage of claimant's distress at the time the contract was entered into, then the additional liability for default exists as from that time. In that case, the recipient 'is liable according to the general rules' of the Code from that date (section 818 para. 4), i.e., the rules of section 285 et seq. dealing with consequences of default. *The liability is, as the claimant's expert correctly stated, a liability for damages.*" (emphasis added)

and at page 128, 10th paragraph, where she stated:

> "In considering the Conversion Law, German courts have consistently distinguished between claims for damages and unjust enrichment claims."

The Court of Appeals pointedly failed to take into account the effect of *bad faith* on a claim for unjust enrichment, undoubtedly because it considered a claim for unliquidated damages incompatible with a debt claim within the meaning of Section 34 of the Trading with the Enemy Act. In light of all the evidence, the District Court's decision insofar as it relates to the non-applicability of the 90% devaluation features of the German Currency Conversion Law should have been affirmed since it was not clearly erroneous, and in fact any holding to the contrary would be clearly erroneous.

Moreover, the Court below was constrained to hold that Reissner's claim must be couched in terms of a Reichsmark

debt because if it were treated as a claim for damages, it would not qualify as a "debt claim" under Section 34 of the Trading with the Enemy Act.

The rationale of the Court below is evident when it stated:

> "If such a claim were not a debt for purposes of German law, it would indeed be anomalous that it could qualify as a debt for purposes of Section 34." (App. B, p. 28)

The Court confused the concept of a debt for liquidated damages, that is damages fixed prior to June 20, 1948 (Reichsmark debts) with debts for unliquidated damages as of that critical date. Clearly Reissner's claim for damages was an unliquidated debt and thus fell in the latter category but is nevertheless a debt within the meaning of Section 34 of the Trading with the Enemy Act. *Miller* v. *Robertson*, 266 U. S. 243.

The Court below, rather than reviewing the District Court's decision, with a view as to ascertaining whether it was clearly erroneous, which is the standard provided by Rule 52(a) of the Federal Rules of Civil Procedure, directed its attention to what it considered to be the standard of review, namely, whether the Attorney General's finding that under the German Currency Conversion Law, Reissner's claim was subject to be converted at the 10 to 1 rate, was clearly erroneous.

However, the law is well settled that the findings of an administrative agency are not to be tested by Rule 52(a) of the Federal Rules of Civil Procedure. 2 *Barron and Holtzoff, Federal Practice and Procedure*, 815.

In *Montana-Dakota Utilities Co.* v. *Federal Power Commission*, 169 F. 2nd 392, 398, the Court said:

> "The findings of an administrative agency are not to be tested by Rule 52(a) of the Rules of Civil Pro-

> cedure, 28 U. S. C. A. following section 723(c), United States v. Gypsum Co., 333 U. S. 364, 395, 68 Supreme Court, 525."

In *International Silk Guild, Inc.* v. *Rogers*, 262 F. 2d 219, the Court of Appeals cited the case of *Morris Plan Industrial Bank* v. *Henderson*, 131 F. 2d 975 as authority for its understanding of the standard, but a reading of that case indicates that the standard of review there was established by statute, since the same referred to the validity of a Referee's findings in a bankruptcy proceeding. Moreover, the case of *Remington-Rand, Inc.* v. *Societe Internationale Pour Participations Industrielles et Commerciales, S. A.*, 188 F. 2d 1011, cert. den. 342 U. S. 832 on which the Court below relies (App. B, p. 28) is entirely based on Rule 52(a). It relates to findings by a Court and not by an administrative agency.

In the case at bar, the findings of fact of the Attorney General as to the application of the German Conversion Law was based entirely on an interpretation of German law as expounded by statute, court decisions and testimony of experts. The credibility of the witnesses was not affected by their demeanor on the stand, because concededly the Attorney General in rejecting the Recommended Decision of the Chief Hearing Examiner, did not have the benefit of observing the witnesses. Thus, the entire record which was presented to the Chief Hearing Examiner in the first instance, to the Attorney General thereafter, and finally to the District Court, was a record, within the four corners of which, each could make an independent finding.

It is submitted that where the findings of fact are matters of foreign law, the decision of the District Court should not be overruled unless the appellate court finds the same clearly erroneous and that the standard of review with respect to a determination of the Office of Alien Property on questions of law should at most be merely persuasive and not conclusive on a district court.

It is respectfully urged that the Court below erred in limiting its review to whether the Attorney General's find-

ings as to the applicability of the German Currency Conversion Law was clearly erroneous, rather than considering whether the decision of the District Court itself was clearly erroneous. Then, too, the determination of the District Court that a claim for unliquidated damages was not subject to a 90% devaluation under the German Currency Conversion Law, was not incompatible with the definition of a debt claim under Section 34 of the Trading with the Enemy Act, and was not clearly erroneous and therefore should have been affirmed.

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2. The decision of the Court below, that the District Court erred when it held that the date for converting a foreign money obligation into dollars is the date of the filing of the claim rather than the date of judgment, passed on an important question of federal law which should be settled by this Court.

The Chief Hearing Examiner of the Office of Alien Property, in the first instance recommended that the foreign money obligation due Reissner should be converted into dollars at the rate of exchange in effect at the time Reissner filed his claim with the Alien Property Custodian on February 24, 1948 (54-70).

After carefully researching the cases relating to the rules for the fixing of the date for the conversion of an unspecified foreign money obligation into domestic currency, he concluded that the so-called "judgment day rule," computing the conversion in accordance with the rate of exchange prevailing at the time when judgment is rendered, stemmed from a misreading and misinterpretation of the majority opinion in the leading case of *Humphrey* v. *Deutsche Bank*, 272 U. S. 517. There, Justice Holmes said:

> "In this case, unlike *Hicks* v. *Guinness*, 269 U. S. 71, at the date of the demand the German Bank owed no duty to the plaintiff under our law. It was not

> subject to our jurisdiction and the only liability that it incurred by its failure to pay was that which the German law might impose. It has incurred no additional or other one since. A suit in this country is based upon an obligation existing under the foreign law *at the time when the suit is brought*, and the obligation is not enlarged by the fact that the creditor happens to be able to catch his debtor here. (Emphasis added.)
>
> "Here we are lending our Courts to enforce an obligation (as we should put it, to pay damages), arising from German law alone and ought to enforce no greater obligation than exists by that law *at the moment when the suit is brought.*" (Emphasis added.)

The Chief Hearing Examiner, after concluding that the Supreme Court had established the "date of filing of suit rule," proceeded to trace the history of the *Humphrey Case, supra,* and even delved into the correspondence between Sir Frederick Pollock and Justice Holmes concerning the theory of vested rights, to support his Recommendation that the proper rule to be applied to the case at bar was the "date of the filing of suit rule," rather than the "judgment day rule."

The Deputy Director of the Office of Alien Property rejected the Recommended Decision and adopted the "judgment day rule," but the District Court below found that the "date of filing suit rule" was correct, impliedly adopting the arguments and the reasoning of the Chief Hearing Examiner. The Court below reversed the District Court and reinstated the "judgment day rule." *

Joseph Dach, in an article entitled "Conversion of Foreign Money" in the American Journal of Comparative

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* The Recommended Decision of the Hon. Harry LeRoy Jones as it relates to this issue has been the subject of a law review note which characterizes the Recommended Decision as "a remarkable instance of independent judicial research and courageous thinking". American Journal of Comparative Law, Volume 6, No. 1, pages 111-114.

Law, Volume 3, No. 2, pages 155-185, after reviewing the rules applied in nine western countries, with respect to the fixing of the date for the conversion of an unsatisfied foreign money obligation into domestic currency, points out that the present "federal" or "judgment day rule" was not settled law in the United States before World War I, and that the trend in almost all countries is to adopt a conversion law which will compensate the creditor for delayed performance of monetary obligations beyond interest.

The conversion problem is of major interest to our courts and litigants and therefore a re-examination and reappraisal of the "judgment day rule" should be had.

The "federal rule" should be reconsidered with a view as to whether it or the "date of filing of suit rule" was enunciated in *Deutsche Bank* v. *Humphrey, supra,* and then again whether changing concepts, motivated by the desire to compensate creditors for delays in payments by debtors of their performance of monetary obligations, indicate the desirability of formulating an equitable rule to be applied in such instances.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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June 7, 1960.

APPENDIX A

Statutes Involved

Trading with the Enemy Act, as amended, Section 34, 60 Stat. 925, 50 U. S. C. App. 34(a).

> "Any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, shall be *equitably applied by* the Custodian in accordance with the provisions of this section to the payment of debts owed by the person who owned such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian. No debt claim shall be allowed under this section if it was not due and owing at the time of such vesting or transfer, or if it arose from any action or transactions prohibited by or pursuant to this Act (sections 1-6 and 7-39 of this Appendix) and not licensed or otherwise authorized pursuant thereto, or (except in the case of debt claims acquired by the Custodian) if it was at the time of such vesting or transfer due and owing to any person who has since the beginning of the war been convicted of violation of this Act (said sections), as amended, sections 1-6 of the Criminal Code, title I of the Act of June 15, 1917 (ch. 30, 40 Stat. 217), as amended; the Act of April 20, 1918 (ch. 59, 40 Stat. 534), as amended; the Act of June 8, 1934 (ch. 327, 52 Stat. 631), as amended (sections 611-621 of Title 22); the Act of January 12, 1938 (ch. 2, 52 Stat. 3); title I, Alien Registration Act, 1940 (ch. 439, 54 Stat. 670); the Act of October 17, 1940 (ch. 897, 54 Stat. 1201); or the Act of June 25, 1942 (ch. 447, 56 Stat. 390) (sections 780-785 of this Appendix). Any defense to the payment of such claims which would have been available to the debtor shall be available to the Custodian, except that the period from and after the beginning of the war shall not be included for the purpose of determining the application of any statute of limitations. Debt claims allowable here-

under shall include only those of citizens of the United States or of the Philippine Islands; those of corporations organized under the laws of the United States or any State, Territory, or possession thereof, or the District of Columbia or the Philippine Islands; those of other natural persons who are and have been since the beginning of the war residents of the United States and who have not during the war been interned or paroled pursuant to the Alien Enemy Act (section 21 of this title); and those acquired by the Custodian. Legal representatives (whether or not appointed by a court in the United States) or successors in interest by inheritance, devise, bequest, or operation of law of debt claimants, other than persons who would themselves be disqualified hereunder from allowance of a debt claim, shall be eligible for payment to the same extent as their principals or predecessors would have been."

Federal Rules of Civil Procedure, Section 52(a), 28 U. S. C. Rule 52(a):

"(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). As amended Dec. 27, 1946, effective March 19, 1948."

APPENDIX B

Opinion Below

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,165

MAX REISSNER,

Appellant,

v.

WILLIAM P. ROGERS, as Attorney General of the United States and Successor to the Alien Property Custodian, and IVY BAKER PRIEST, Treasurer of the United States,

Appellees.

No. 15,166

WILLIAM P. ROGERS, as Attorney General of the United States and Successor to the Alien Property Custodian, and IVY BAKER PRIEST, Treasurer of the United States,

Appellants,

v.

MAX REISSNER,

Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Decided March 10, 1960

MR. ERNEST FLEISCHMAN of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of

court, for appellant in No. 15,165 and appellee in No. 15,166. MR. GERALD B. GREENWALD was on the brief for appellant in No. 15,165 and appellee in No. 15,166.

MR. GEORGE B. SEARLS, Attorney, Department of Justice, for appellees in No. 15,165 and appellants in No. 15,166. MESSRS. IRWIN A. SEIBEL and IRVING JAFFE, Attorneys, Department of Justice, also entered appearances for appellees in No. 15,165 and appellants in No. 15,166.

Before WILBUR K. MILLER, WASHINGTON and BASTIAN, *Circuit Judges.*

WASHINGTON, *Circuit Judge*: These are appeals from grants by the District Court of cross-motions for summary judgment in a suit brought by Mr. Reissner under Section 34(e) of the Trading With the Enemy Act, added by 60 Stat. 925 (1946), as amended, 63 Stat. 107 (1949), 50 U. S. C. App. § 34(e) (1958), to recover a debt claim against the assets of Schering-Kahlbaum A.G. ("Schering"), a German company, held by the Office of Alien Property under vesting orders entered during World War II.

The facts as they appear of record may be summarized as follows: Reissner, a man of the Jewish faith, owned all of the stock of a German company called "Anticoman GmbH," which produced a patent medicine called "Anticoman," purportedly an oral remedy for diabetes. On March 1, 1937, Reissner sold to Schering the assets of this company, with certain exceptions, for Reichsmarks (RM) 153,300. Reissner left Germany shortly thereafter. On February 24, 1948, he filed a claim in the Office of Alien Property against Schering's vested assets. He there contended that the 1937 sale to Schering was void under Section 138 of the German Civil Code because it was *contra bonos mores* and because the inadequate purchase price resulted from Schering's exploitation of Reissner's religious disability; that these acts gave rise to claims in quasi-contract for unjust enrichment under Sections 812,

817, 818 and 819 of the German Civil Code, entitling him to return of the business and, on failure of return, to damages from Schering; and that this is a valid debt claim under Section 34.

The Hearing Examiner of the Office of Alien Property recommended that Reissner's claim be allowed as a debt in the amount of RM 273,507, together with interest at 4% from March 1, 1937, the date of transfer. The Hearing Examiner also recommended that this currency obligation be converted into dollars at the rate of RM 3.33 to $1.00, the exchange rate prevailing in 1948 when the claim was filed. On review, the Deputy Director of the Office of Alien Property agreed with the Hearing Examiner that a debt claim had been stated and that the outstanding debt at the time of transfer was RM 273,507. He ruled, however, that under the German Currency Conversion Law of 1948 this amount was to be converted into Deutsche Marks at the rate of 10 Reichsmarks for 1 Deutsche Mark, and that the Deutsche Marks were to be converted into dollars at the rate prevailing on the "judgment day." On December 23, 1957, the Attorney General, successor to the Alien Property Custodian, approved the Deputy Director's decision.

In his complaint for review of this decision in the District Court Reissner asserted that the amount of indebtedness as of March 1, 1937, was RM 651,331, that the debt was not subject to the German Currency Conversion Law, and that Reichsmarks should be converted into dollars at the rate of RM 2:50 to $1.00. He asked judgment for $260,533.24 with interest at 4% from March 1, 1937. Following the filing of the Attorney General's answer both parties moved for summary judgment.

The District Court sustained the finding of the Deputy Director that the Reichsmark debt was 273,567. It held, however, that the German Currency Conversion Law was inapplicable, ordered the debt converted at the rate of

3.33 Reichsmarks per dollar, and entered judgment for $82,134.23 plus interest at 4% from March 2, 1937. On appeal Reissner renews his contention that the net value of the property taken by Schering in 1937 was RM 651,331 and that the proper conversion ratio was RM 2.5 for $1.00. The Attorney General urges, *inter alia*, that the finding of the District Court with respect to the amount of the debt as of March 1, 1937, cannot be overturned because it is not clearly erroneous, and that the District Court erred in holding that the German Currency Conversion Law was inapplicable.

Both the Attorney General and the District Court determined that Reissner's claim against Schering was eligible as a "debt claim" within the meaning of Section 34 of the Trading With the Enemy Act, as amended, 50 U. S. C. App. § 34, apparently because under German law the claim was a quasi-contractual one for money. We accept the Government's concession here that Reissner has a "debt claim" in some amount which under Section 34 may be paid out of the assets of Schering vested in the Attorney General as successor to the Alien Property Custodian. Our first question then is whether the finding as to the amount of this claim, that is, the finding as to the value of the Anticoman assets on the date of transfer, should be overturned, as Reissner contends.

I.

Section 34(c) of the Trading With the Enemy Act provides for the allowance or disallowance of debt claims by the Custodian after examination of such evidence as may be before him.[1] If the claimant is dissatisfied, he may

[1] Section 34(c) provides:

"The Custodian shall examine the claims, and such evidence in respect thereof as may be presented to him or as he may introduce into the record, and shall make a determination, with respect to each claim, of allowance or disallowance, in whole or in part."

under Section 34(e)[2] ask review of the disallowance by the District Court. The court may in its discretion take additional evidence upon a showing that the evidence was excluded by the Custodian, was not available to him, or could not reasonably have been presented to him. In the present case no additional evidence was offered to the District Court. Thus, the District Court, and we, may set aside the Attorney General's finding of value only if on the record before him it was "clearly erroneous." *International Silk Guild* v. *Rogers*, 104 U. S. App. D. C. 330, 262 F. 2d 219 (1958); *Morris Plan Industrial Bank* v. *Henderson*, 131 F. 2d 975, 977 (2d Cir. 1942).

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[2] Section 34(e) provides:

"If the aggregate of debt claims filed as prescribed does not exceed the money from which, in accordance with subsection (d) of this section, payment may be made, the Custodian shall pay each claim to the extent allowed, and shall serve by registered mail on each claimant whose claim is disallowed in whole or in part, a notice of such disallowance. Within sixty days after the date of mailing of the Custodian's determination, any debt claimant whose claim has been disallowed in whole or in part may file in the United States District Court for the District of Columbia a complaint for review of such disallowance naming the Custodian as defendant. Such complaint shall be served on the Custodian. The Custodian, within forty-five days after service on him, shall certify and file in said court a transcript of the record of proceedings in the Office of Alien Property Custodian with respect to the claim in question. Upon good cause shown such time may be extended by the court. Such record shall include the claim as filed, such evidence with respect thereto as may have been presented to the Custodian or introduced into the record by him, and the determination of the Custodian with respect thereto, including any findings made by him. The court may, in its discretion, take additional evidence, upon a showing that such evidence was offered to and excluded by the Custodian, or could not reasonably have been adduced before him or was not available to him. The court shall enter judgment affirming, modifying, or reversing the Custodian's determination, and directing payment in the amount, if any, which it finds due."

Appendix B—Opinion Below

The Deputy Director and the Attorney General adopted the determination of value for the transferred Anticoman assets which was made by the Hearing Examiner. The evidence offered by Reissner centered on the profits made by Schering from its sales of "Anticoman" medicine, after the transfer. The indebtedness of RM 273,507 found by the Hearing Examiner was arrived at by ascertaining the figure of RM 426,807 as the profits for the years 1937-1942 [3] realized by Schering on the sale of the medicine and subtracting from that figure the RM 153,300 paid to Reissner by Schering. It was not disputed that the figure of RM 153,300 represented the value of the tangible assets on March 1, 1937.[4] Thus, the figure of RM 273,507 was determined as the value of the intangible assets or goodwill on that date.

Reissner contends that the profits made by Schering were RM 654,631, instead of RM 426,807 as found by the Hearing Examiner, the Attorney General, and the District Court. The actual profit made by Schering for the period it produced and sold Anticoman is not shown by the record. The record shows only that Schering grossed a total of RM 1,435,596 from sales of Anticoman during the years 1937 to 1944, inclusive,[5] and that it realized a profit of 45.6% on sales totalling RM 241,064 in 1938 and a profit of 29.8% on sales totalling RM 262,742 in 1939. Reissner would have us apply the ratio of 45.6% to gross

[3] Schering discontinued the production of Anticoman in July, 1942, because of threats to prohibit its use made by a German Commission on Patent Medicines composed of public health authorities, pharmacists, physicians, and representatives of the Ministry of the Interior. It made a few sales, however, in 1943 and 1944.

[4] On its provisional balance sheet for 1936, Anticoman valued all its tangible assets at RM 152,964.61 and its "invisible" assets at RM 195,000.

[5] Gross sales totaled only RM 8,978 in the two years 1943 and 1944.

sales for all the years 1937-1944, inclusive, to obtain the total profit figure for those years, whereas the Hearing Examiner determined the profit figure by applying 29.8% as the profit ratio to gross sales for the years 1937-1942, inclusive, stating that "considering everything", this was fair in his opinion.[6] Reissner points to nothing in the record before us to substantiate his claim that Schering's profits were at least 45.6% of the gross sales in years other than 1938. He points out that after 1938 Schering allocated to Anticoman sales a percentage of the laboratory research costs in other fields and a larger share of the general overhead expenses, but nothing is shown from which we could conclude that this was improper or that, absent this, the profits would have remained at 45.6% of gross sales for 1939 and subsequent years. Reissner does not suggest any other way for determining the profits, or the value of the business. In the circumstances we cannot characterize the finding as to the amount of Schering's profits as clearly erroneous.

As already indicated, the Hearing Examiner used the profit figure of RM 426,074 for the five-year period 1937-1942 as indicating the combined value of the tangible and intangible assets transferred. Reissner's contention that he was entitled to recover the value of the tangible assets plus Schering's entire profits from the use of the Anti-

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[6] The fact that the Anticoman business was in the process of involuntary liquidation due to professional and governmental opposition to use of the product would suggest that the profit ratio may have fallen below 29.8% in the years after 1939. Reissner's profit ratio on the business in 1936, also a time when the business was subject to governmental harassment because Reissner was Jewish, had been about 18% on the basis of his own profit and loss statement, and 12% on the basis of Schering's adjustments to that statement. There was also testimony that while owned by Schering the sales prices of Anticoman did not change, but the manufacturing costs underwent certain fluctuations, and the total costs were subject to still greater fluctuations.

coman assets as damages necessarily connotes either that he is not entitled to be compensated for the value of the intangible assets transferred, or that Schering's profits establish the value of the intangible assets. Neither assumption is tenable. It seems conceded that under Sections 812 and 818 of the German Civil Code Reissner was entitled to receive the value of all assets transferred, both tangible and intangible. Profits are earned by use of all the business assets in combination, both tangible and intangible. There is no valid basis for attributing all the profits earned by Schering exclusively to the goodwill and other intangibles acquired from Reissner.

The two experts on German law who testified in this case agreed that, in addition to the value of the assets transferred and interest at 4%, Reissner under German law would be entitled to such damages as he could prove. Reissner apparently claims all of Schering's profits on Anticoman sales as additional damages. But the Hearing Examiner stated:

> "The claimant has not offered evidence of any injury for which he will not be made whole by interest except that which he may have suffered by reason of the delay in payment beyond the reestablishment of the German monetary system in 1948, and his residence outside Germany."

This view was accepted by the Attorney General and the District Court, and we perceive no error in their so doing.

We conclude that the finding that the amount of the debt due Reissner is 273,507 Reichsmarks with interest at 4% from March 1, 1937, was not clearly erroneous.

II.

We turn to the problems involved in converting the amount of Reissner's compensable claim in Reichsmarks, as of March 1, 1937, to an amount stated in American

currency. The initial problem is to determine the appropriate date as of which this conversion from foreign to domestic currency should be made.

In *Deutsche Bank* v. *Humphrey*, 272 U. S. 517 (1926), where suit was brought under Section 9 of the Trading With the Enemy Act for breach of contract to pay foreign currency in the foreign country, the Supreme Court held that the amount recoverable in foreign currency was to be converted into dollars at the rate of exchange on the date judgment was entered. And we have applied this so-called "judgment day rule" in converting into dollars a foreign currency claim created by foreign law. See *Strachler* v. *Brownell*, 100 U. S. App. D. C. 394, 246 F. 2d 675 (1957), affirming a decision of the District Court, No. 774-56, dated June 29, 1956 (D. D. C.) (a proceeding under Section 34). Other courts have reached similar conclusions. See *Paris* v. *Central Chiclera*, 193 F. 2d 960 (5th Cir. 1952); *Shaw, Savill, Albion & Co., Ltd.* v. *The Fredericksburg*, 189 F. 2d 952 (2d Cir. 1951); *Indian Refining Co.* v. *Valvoline Oil Co.*, 75 F. 2d 797 (7th Cir. 1935); *Tillman* v. *Russo Asiatic Bank*, 51 F. 2d 1023 (2d Cir. 1931), cert. denied, 285 U. S. 539 (1932). See also *International Silk Guild* v. *Rogers*, 104 U. S. App. D. C. 330, 335, 262 F. 2d 219, 224 (1958); Note, 40 HARV. L. REV. 619, 621-25 (1927); 5 WILLISTON ON CONTRACTS 3927-31 (Rev. ed. 1937); RESTATEMENT, CONFLICT OF LAWS § 424 (1934). The view urged here that *Deutsche Bank* has been misread and that it really established as the conversion date the date on which the claim was filed has been considered and rejected in several of the cases cited above. We think that question is now to be regarded as settled, and that we are bound to apply the judgment date rule in cases like the present.

In this case there is no question that Reissner's underlying claim against Schering was given him by German law and that the liability was to pay him the amount of

the debt in German currency. The "judgment day" rule of *Deutsche Bank* thus seems clearly applicable.

The District Court was the first tribunal to enter a "judgment" in the strict sense in this case. But prior thereto the Attorney General as successor to the Custodian was charged under Section 34(c) with the responsibility of making a determination of allowance or disallowance of the claim in whole or in part. He did so on December 23, 1957. The judgment in the District Court was entered in a review of the Attorney General's decision. In cases instituted in the District Court to establish a claim initially, the date of the judgment of the District Court is the judgment date for purposes of conversion, whether or not that judgment is thereafter modified, affirmed, or reversed. *Paris* v. *Central Chiclera, supra; Shaw, Savill, Albion & Co., Ltd.* v. *The Fredericksburg, supra; Indian Refining Co.* v. *Valvoline Oil Co., supra; Tillman* v. *Russo Asiatic Bank, supra.* We think that the Attorney General's decision to allow the claim in this case corresponds to the District Court's judgment in the cited cases as the first final judgment subject to review, and that the Schering debt in German currency is to be converted into dollars at the rate of exchange on the date of the Attorney General's decision.

III.

The conversion problem does not end, however, with a determination that Reissner's claim in German currency is to be computed in dollars as of the judgment day. The rate of exchange must still be considered. The holding in *Deutsche Bank, supra,* would seem to imply that a debt claim such as Reissner's is subject to modification by change in the currency system of the foreign Country prior to judgment. Here, prior to judgment, the German

currency system was, in fact, altered so that Reichsmarks—the currency in which Reissner's compensable injury was originally computed—were replaced by Deutsche Marks as legal tender. Under the law establishing the new currency,[7] Reichsmarks "debts and claims arising out of debts" were to be converted into Deutsche Marks at the rate of 10 Reichsmarks to one Deutsche Mark.[8] If, under German law, Reissner's claim against Schering was a debt or claim arising out of a debt, then clearly its amount in Reichsmarks was convertible into Deutsche Marks at the prescribed ratio. If, on the other hand, Reissner's claim fell within certain other categories, it would be convertible at the rate of 1 Deutsche Mark for 1 Reichsmark.[9]

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[7] Military Government Law No. 63 was issued on June 27, 1948, for the American and British Zones of Germany, and is printed in 13 FED. REG. 4965 at 4971. The law applicable here is the Second Ordinance of the Commandants of the American, British, and French Sectors of Berlin dated July 4, 1948 (known as the Berlin Conversion Ordinance). Insofar as material here, the language of the two laws is said to be virtually identical. The provisions of Law No. 63 only will hereafter be cited.

[8] Article 16 of Military Government Law No. 63 provided that "Reichsmark claims shall be so converted into Deutsche Mark claims that the debtor shall be obliged to pay to the creditor one Deutsche Mark for every ten Reichsmarks due." Article 13 defined Reichsmark "debts and claims" as "all debts and claims arising out of debts incurred before June 21, 1948, which are expressed in Reichsmarks. . . ." See 13 FED. REG. 4965, 4973.

[9] Obligations for payments of wages, salaries, rent, social security pensions, annuities and the like coming due after June 20, 1948; obligations arising out of contracts of purchase or for work where performance of the contract or work was made after June 20, 1948; and obligations arising out of settlements between partners, heirs, married persons, legatees and the like. Art. 18 of Law No. 63; see 13 FED. REG. at 4973.

Appendix B—Opinion Below

The determination of the Attorney General that under the German Conversion Law Reissner's claim was a debt claim subject to conversion at the 10 to 1 rate was a finding of fact,[10] of a sort which on review may not generally be overturned unless clearly erroneous. *Remington-Rand, Inc.* v. *Societe Internationale Pour Participations Industrielles et Commerciales S.A.*, 88 U. S. App. D. C. 275, 188 F. 2d 1011, cert. denied, 342 U. S. 832 (1951) (action under Section 9(a) of the Trading With the Enemy Act); Note 72 HARV. L. REV. 318, 322-24 (1958). Cf. *International Silk Guild* v. *Rogers, supra.*

We conclude that the District Court was not justified in reversing the finding as clearly erroneous. The finding is in accord with decisions of the Supreme Federal Court of Western Germany rendered in 1952, 5 BGHZ 197; 6 BGHZ 227; 7 BGHZ 256, and decisions of the Supreme Court of the British Zone of Germany rendered in 1948, 1OGHBZ 198, and in 1950, 3 OGHBZ 275; it is supported by the opinion and testimony of one of the expert witnesses, based on these cases and other authorities cited by her.[11] Reissner's claim was asserted in quasi-contract on a theory of unjust enrichment and, as the decisions mentioned above point out, it is a claim for money as a substitute for the original thing, if restitution is not possible, and as such is a debt convertible at the 10 to 1 ratio. If such a claim were not a debt for purposes of German law, it would indeed be anomalous that it could qualify as a debt for purposes of Section 34. And of course the policy underlying Section 34 would

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[10] See Black Diamond v. Stewart & Sons, 336 U. S. 386, 396-97 (1949); Cuba R.R. Co. v. Crosby, 222 U. S. 473, 479 (1912).

[11] *E.g.*, Graue, *German: Delimination of Unjust Enrichment Claims*, 3 AM. JOURNAL OF COMPARATIVE LAW 95-97 (1954); Palandt's *Kommentar* (12th ed. 1954), § 818, note 5c; Harmening-Duden, *Die Wahrungsgesetze* 184-85 (1949).

hardly contemplate that a "debt claim" within the scope of that section would include compensation for the depreciation of German currency prior to the time the claim was recognized as valid. See *International Silk Guild* v. *Rogers*, 104 U. S. App. D. C. at 337, 262 F. 2d at 226 (separate opinion).

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For these reasons, the judgment of the District Court will be affirmed in part, reversed in part, and the cause remanded.

So ordered.

APPENDIX C

Judgment Below

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,165 September Term, 1959.

Civil 3245-57

MAX REISSNER,

Appellant,

v.

WILLIAM P. ROGERS, as Attorney General of the United States and Successor to the Alien Property Custodian, and IVY BAKER PRIEST, Treasurer of the United States,

Appellees.

No. 15,166 September Term, 1959.

Civil 3245-57

WILLIAM P. ROGERS, as Attorney General of the United States and Successor to the Alien Property Custodian, and IVY BAKER PRIEST, Treasurer of the United States,

Appellants,

v.

MAX REISSNER,

Appellee.

Appeals from the United States District Court for the District of Columbia.

Before: Wilbur K. Miller, Washington and Bastian, Circuit Judges.

Appendix C—Judgment Below

JUDGMENT

These appeals came on to be heard on the record from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the judgment of the District Court appealed from in these cases is affirmed in part and reversed in part, and that the cause is remanded to the said District Court for further proceedings not inconsistent with the opinion of this court.

PER CIRCUIT JUDGE WASHINGTON.

Dated: March 10, 1960.

I, GEORGE HALPERN, Counsel for the Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 7th day of June, 1960, I served copies of the foregoing petition for writ of certiorari on the respondents William P. Rogers, as Attorney General of the United States and Successor to the Alien Property Custodian, and Ivy Baker Priest, Treasurer of the United States, by mailing copies in duly addressed envelopes, with first-class postage prepaid, to respondents' attorneys of record as follows: Solicitor General of the United States, U. S. Department of Justice, Washington 25, D. C., George B. Searls, Esq., Department of Justice, Washington 25, D. C.

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